No. 11733

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

J. H. GALLAGHER, J. IRA MCNUTT, AND EARL L. MCNUTT, APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

778209—48

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For convenience of reference, the arguments advanced by appellees will be discussed under the appropriate headings of appellant's main brief.

ARGUMENT

I

Appellees' interests in the entire road were adjudicated in the condemnation action, and they are estopped from maintaining this action for the fair market value of the use of a portion of the road

A. *Appellees' contention that the condemnation judgment did not include compensation for the use of the road between October 1, 1942 and August 19, 1944*

is without merit.—Appellees assert (Br. 18–19) that they had three distinct Tucker Act claims "in addition to their right to compensation in the Gossler condemnation action." First, for the market value of their interest in the Crocker land; second, for the market value of the use made by the Government of the road upon the Crocker land up to the time of payment for their interest in the Crocker land; and third, for the value of the use made by the Government of the road on the Crown Zellerbach Corporation property. Appellees further assert (Br. 17–18) that since no declaration of taking was filed, title to the interest in the road did not pass until payment of the judgment. It is asserted that in the condemnation proceeding the Government would acquire appellees' interest in the Crocker land and the Crown Zellerbach land "as of the date of the payment of the judgment and not before" (Br. 22). Appellees conclude that they are entitled to recover the value of the use made of their land up to the time the award was paid (Br. 22–23).

All of this argument is based on the false premise that for the purpose of determining compensation there is no "taking" until title passes, and that there is a distinction between a claim for *use* of the road and a claim for the value of appellees' interest in the road. On the contrary, compensation for the use of property from the time possession is taken until the payment of the award takes the form of interest. *Commercial Station Post Office* v. *United States,* 48 F. 2d 183, 185 (C. C. A. 8, 1931). This is true whether the United States merely takes possession and leaves

the owner to his recourse under the Tucker Act, whether it takes possession in a condemnation proceeding, or whether it takes possession prior to instituting a condemnation proceeding. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299 (1923); *Jacobs* v. *United States,* 290 U. S. 13 (1933); *United States* v. *Rogers,* 255 U. S. 163, 169 (1921); *Forbes* v. *United States,* 268 Fed. 273, 278 (C. C. A. 5, 1920); *11,000 Acres of Land, Etc.* v. *United States,* 152 F. 2d 566 (C. C. A. 5, 1945), certiorari denied 328 U. S. 835. The rule that date of "taking" for the purpose of determining value is the date of taking possession is a principle of substantive law under the Fifth Amendment of the Federal Constitution which controls in federal condemnation proceedings, rather than state law that market value is determined at the date of trial. *Comparet* v. *United States,* 164 F. 2d 452 (C. C. A. 10, 1947); *United States* v. *Johns,* 146 F. 2d 92 (C. C. A. 9, 1944). Hence, the provisions of the Oregon Constitution[1] and the decisions thereunder cited by appellees (Br. 14, 19) are irrelevant here. And, under the Federal Constitution the value of property taken is determined by reference to the market value at the date possession was taken.

> Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the

[1] Like the constitutions of many other states, the Oregon Constitution requires that payment be made prior to the taking of possession. The Federal Constitution does not so limit the power of eminent domain. *Garrow* v. *United States,* 131 F. 2d 724, 726 (C. C. A. 5, 1942), certiorari denied, 318 U. S. 765.

> taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Seaboard Air Line Ry. v. *United States,* 261 U. S. 299, 306 (1923).

When that is done, just compensation has been paid and the condemnee is not entitled to recover, in addition, the value of the use of the property between the date of taking and the date of payment. Cf. *United States* v. *6.87 Acres of Land, Etc.,* 147 F. 2d 351 (C. C. A. 2, 1945).

These principles were applied in the condemnation proceeding. The jury's verdict determined the value of the road "as of June 18, 1942" (R. 84), and the judgment awarded this sum "together with interest at the rate of six percent per annum from June 18, 1942, until paid." Thus, in the condemnation proceeding the market value of the entire road was determined as of the date possession was taken in 1942, and interest was allowed from that date until the date of payment. This constituted payment of just compensation as required by the Fifth Amendment, and appellees here are not entitled to anything more.

B. *Appellees were paid for their interest in the entire road by receipt of the amount of the judgment in the condemnation proceeding.*—In our main brief, pp. 10–16, we have demonstrated by reference to the stipulation of the parties, the verdict of the jury, and the judgment in the condemnation case that appellees recovered in that case the value of their entire interest

in the road, and not merely the value of the segment of the road over the Gossler land. Appellees rely upon Finding XIX, which states (R. 52):

> Plaintiffs' claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.

Appellees contend in their brief (p. 16) that appellant is not in a position to challenge this finding, because the record in the Gossler condemnation action was not made a part of the record on this appeal. But the question is not one of fact at all. The United States is relying upon the judgment in the condemnation proceeding. The effect of that judgment is a question of law. As we have shown, *supra,* the finding was apparently based on the erroneous conclusion of law that the United States is obligated to pay both the value of property at the date of taking with interest and the value of the use of the property pending payment. Moreover, it is the judgment as entered to which the court must look in subsequent collateral proceedings to determine what it adjudges, and extrinsic evidence is not admissible to show that it differs from the judgment actually pronounced. *Freeman on Judgments* (5th ed.), sec. 767, p. 1626. Hence, the oral statement of the court in the condemnation case, upon which appellees rely (Br. 8 and 12), cannot alter the stipulation, verdict, and judgment in that case.

Furthermore, the Government designated "the complete record and all of the proceedings and evidence, including exhibits to the complaint, to be included in

the record on appeal" (R. 63). The entire record in the Gossler condemnation case was not a part of the official record in the present case, and could not be designated as a part of the record on this appeal. The material portions of the record in the condemnation case were made a part of the record in this case, either in connection with the pre-trial order, or by being read into the record at the trial. Certainly, under these circumstances the burden was upon appellees to include in the record any other portion of the condemnation proceeding upon which they proposed to rely.[2] See page 12 of appellant's main brief. The position of the Government was made clear in the statement of points to be relied upon (R. 64–65). Appellees did not suggest that any additional portions of the condemnation record were necessary to decision of the question here presented. Indeed, even in their brief in this Court, while seeking affirmance on the ground that all of the condemnation record is not before this Court, they do not refer to any additional material which would tend to show that the condemnation award was limited to a small segment of the road nor do they assert that such material exists.

II

In any event, the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel

[2] The cases cited by appellees (Br. 12, 16) are not in point, since they all involved instances where the appellant designated less than the entire record of the case which was on appeal.

As the Government pointed out in its main brief, pp. 16–20, the award in this case represents not the value of the portion of the road on the Crown Zellerbach tract, but instead the value of the entire road less the amount of the verdict in the condemnation proceeding and other deductions. Appellees assert (Br. 21) that they are entitled to be compensated for the Government's use of the Crocker segment of the road, but that claim has never previously been made by them in this case. On the contrary, appellees' counsel stated at the trial of this case that in the condemnation action the court instructed the jury to find the value of appellees' interest in the Gossler and Crocker lands, not in the Crown Zellerbach land (R. 77). Again, in his final argument to the court below (R. 136) he made the statement that when they came to trial in the condemnation action the Government conceded that the measure of damages for the taking of the Gossler section of the road was the reasonable and fair market value of the whole road, "and we were willing to try the case on that basis, which meant that we were willing to waive the Tucker Act claim for the Crocker land because the Government obviously had title to that." And at page 138 of the record counsel stated: "The only thing which was litigated in the Gossler case was the value, as Judge Fee's instructions show, of the McNutt Brothers' and Gallagher's interest, insofar as the Crocker and Gossler lands are concerned, and nothing else."

The pre-trial order (R. 32–40), the findings of fact and the conclusions of law (R. 46–54) all show that

the recovery was strictly limited to the use of the Crown Zellerbach portion of the road. Indeed, in another portion of their brief, appellees say that they had a separate and distinct Tucker Act claim for the use of the segment of the road over the Crocker land and for the use of the segment of the road over the Crown Zellerbach land (Br. 18–19). Plainly, appellees may not assert a claim for the segment of the portion of the road over the Crocker land for the first time in this Court.

As we have pointed out in our main brief, the measure of compensation, if any, is the market value of the use of the road and not the cost thereof. Appellees seemingly argue that cost was simply one of the factors considered by the court (Br. 25) but this is not the case. The memorandum opinion of the court (R. 41) affirmatively shows that its award was based solely upon the cost of the road less certain deductions. The court there said (R. 41): "I think it is not inequitable for the plaintiff to recover his cost less sums and credits previously received." As we have pointed out in our main brief, the Fifth Amendment does not require a return of investment, but merely assures the payment of value of property taken. When it thus affirmatively appears that the court has used the wrong measure of compensation, its award must be set aside even if—which is not the case here—there is evidence which would otherwise support the award. *Iriarte, et al.* v. *United States,* 157 F. 2d 105 (C. C. A. 1, 1946).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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FEBRUARY 1948

U. S. GOVERNMENT PRINTING OFFICE: 1948